

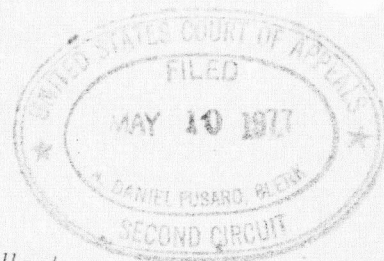
***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

ORIGINAL
77-7080

United States Court of Appeals
FOR THE SECOND CIRCUIT



SIMON O. AYAH,

*Plaintiff-Appellant,
Pro Se*

against

NEW YORK UNIVERSITY,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE

WILLIAM C. PORTH

Attorney for Defendant-Appellee

70 Washington Square South

New York, New York 10012

Tel.: (212) 598-2691

Of Counsel:

KATHARINE B. DESAI

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ISSUES PRESENTED

1. Whether the District Court had discretionary power to dismiss the complaint sua sponte after denying the motion for a preliminary injunction.
2. Whether the dismissal of the complaint was a proper exercise of the District Court's discretion and not, in any way, an abuse of that discretion.
3. Even assuming that the provisions of Rule 65 (a) (2) (with respect to the consolidation of a hearing on a preliminary injunction with a trial on the merits) apply to this case, whether the plaintiff was prejudiced by the District Court's dismissal of the underlying complaint.
4. Whether the District Court correctly determined that the present action was barred by reason of the doctrines of res judicata and direct estoppel.

DOCKET NO. 77-7080

Plaintiff appeals from an order of the District Court denying his application for a preliminary injunction and dismissing the underlying complaint in an action for a declaratory judgment pursuant to 28 U.S.C.A. §2201.

STATEMENT OF THE CASE

Nature of the Case.

This is a pro se action against New York University for a declaratory judgment pursuant to 28 U.S.C.A. §2201. The plaintiff alleges in his complaint that the Court has both federal question jurisdiction (28 U.S.C. §1331) and diversity jurisdiction (28 U.S.C. §1332); and that the Court's subject matter jurisdiction is based on the First and Fourteenth Amendments of the United States Constitution. The complaint further alleges that the plaintiff is claiming against the defendant a sum in excess of \$10,000.00. The relief requested in the complaint is for a declaration that: 1) that the term "M.A. or its equivalent" is ambiguous; 2) that the defendant violated plaintiff's rights, as well as its own regulations, by communicating confidential records about plaintiff to another institution; 3) that the defendant changed the plaintiff's status to non-degree without due process and in violation of its regulations; 4) that the defendant refused plaintiff access to certain documents in violation of the Freedom of Information Act and the Buckley Amendment of 1974; and 5) that the defendant must make reparation to the plaintiff for the breach of the University's regulations and the violation of the rights of the plaintiff guaranteed and protected by the First and Fourteenth Amendments. With the possible exception of the relief requested

in items 1 and 4 above, the same relief based on the same facts was the subject of an action instituted by plaintiff in the United States District Court for the Eastern District of New York. On June 1, 1976 that Court, on defendant's motion, dismissed the complaint and granted summary judgment for the defendant. Plaintiff filed a Notice of Appeal to this Court which was dismissed on December 22, 1976 for lack of prosecution.

The Course of the Proceedings.

Defendant New York University was served with the Summons and Complaint in this action on December 9, 1976. Thereafter defendant's time to answer, or otherwise plead to the complaint was extended to January 12, 1977 by order of the District Court dated December 22, 1976 (R.I. #5)* and to January 21, 1977 by order filed January 14, 1977 (R.I. #8).

On December 28, 1976, on ex parte application, the plaintiff pro se obtained an order to show cause for a preliminary injunction signed by Judge Griesa. (R.I. #6) Although the caption of the case indicated that New York University was the defendant, the order to show cause was directed to

* The Pro Se Clerk for the Second Circuit U. S. Court of Appeals has advised the defendant-appellee that the Court does not require a pro se plaintiff-appellant to prepare and file an Appendix to the Briefs as otherwise required by Rule 30, Federal Rules of Appellate Procedure, and that defendant-appellee is thus also not required to prepare an Appendix. For the Court's convenience, when referring to parts of the record, defendant-appellee will cite the number of the document in the Index to the Record on Appeal (R.I. #) or to the number of the Index to the Supplemental Record on Appeal (S.R.I. #).

"Respondent, Robert R. Raymo". The Court ordered that the order and supporting documents be served on Robert R. Raymo, the respondent, on or before December 29, 1976. Since the University post office, to which all mail is delivered, was closed for holidays on December 29 through 31, 1976, the order to show cause for preliminary injunction and its supporting papers, which were served by mail, were not received until January 3, 1977.

The return date for plaintiff's motion for a preliminary injunction was January 7, 1977. By reason of the late service of the moving papers, the defendant did not have sufficient time to serve its papers in opposition to the motion within three days prior to the return date, as generally required under Rule 9 of the General Rules of the U. S. District Courts, Southern and Eastern Districts of New York. Defendant had no means of communicating with the plaintiff except through a post office box. Both plaintiff and defendant were heard by Judge Carter (in the absence of Judge Tenney to whom the case was originally assigned), who was sitting that day to hear motions. The defendant advised the Court of the previous litigation in the District Court for the Eastern District of New York between the plaintiff and defendant New York University, referring the Court to its affidavits in opposition to the plaintiff's application for preliminary injunction, which included a copy of the Memorandum and Order of Judge Costantino, U. S. District Court,

Eastern District of New York (Exhibit AA to Desai Affidavit of January 6, 1977, R.I. #7) and a copy of the December 20, 1976 Order of the Clerk, Second Circuit Court of Appeals dismissing the appeal (Exhibit EE to Desai Affidavit). Defendant also advised the Court of its intention to move for summary judgment dismissing the present complaint. (R.I. #7) On January 21, 1977, defendant filed a notice of motion, directed to Judge Tenney, to dismiss the complaint and for summary judgment pursuant to Federal Rules of Civil Procedure 12 (b) and 56 (b), with supporting affidavits (R.I. #9) and a Memorandum of Law. (R.I. #10)

Disposition of the Case.

Judge Carter by endorsement dated January 25, 1977 vacated the order to show cause, denied the plaintiff's motion for a preliminary injunction and dismissed the underlying complaint for a declaratory judgment on the basis of res judicata. (R.I. #11) Thereafter, Judge Tenney by endorsement dated January 26, 1977 denied as moot the defendant's motion to dismiss the complaint and for summary judgment, on the ground that the underlying complaint had been dismissed by Judge Carter. (R.I. #9)

On February 14, 1977, the plaintiff filed a Notice of Appeal from the order of dismissal entered in the action on January 25, 1977. (R.I. #12) Prior to that time, the plaintiff had filed a motion for reconsideration of the Court's order of

January 25, 1977 dismissing the complaint. The plaintiff's affidavit in support of that motion referred to papers he had filed in opposition to plaintiff's motion to dismiss the complaint (R.I. #16) and an answering Memorandum in Opposition to a Motion to Dismiss the Complaint. (R.I. #15) On March 7, 1977, Judge Tenney dismissed the motion for reconsideration, his endorsement noting that the plaintiff had taken an appeal of the order of January 25, 1977 dismissing the underlying complaint. (R.I. #14)

STATEMENT OF THE FACTS

The following facts are clearly established by the documentary evidence attached to the complaint and by defendant New York University's affidavits and attached exhibits in opposition to plaintiff's application for a preliminary injunction, as well as the affidavits submitted by defendant in support of its motion to dismiss the complaint.

The plaintiff applied for admission to the Ph.D. program in the Department of Politics of New York University Graduate School of Arts and Science in July of 1973 and represented in his application that he would receive, or was entitled to receive, the M.A. degree from Laval University, of Quebec, Canada, in September, 1973. Receipt of the M.A. degree was a condition of acceptance of an applicant to the Ph.D. program, and the plaintiff was accepted in the Ph.D. program conditionally, subject to the evaluation of the final transcripts from Laval University certifying the receipt of his M.A. degree and his passing a matriculation examination at New York University. (Affidavit of Robert R. Raymo, January 5, 1977, R.I. #7)

The plaintiff did not submit evidence of the required M.A. degree from Laval University, but on the strength of his representations that the certification would be forthcoming, he was permitted to take courses at New York University as a non-matriculated (i.e. non degree) student. Two of these courses were accepted by Laval University and credited towards fulfilling

the plaintiff's course requirements at Laval University towards the M.A. degree. The plaintiff, however, never did receive an M.A. degree from Laval University. Finally, after much discussion and correspondence between plaintiff and various officials of New York University, he was advised by the Chairman of the Politics Department at New York University in February, 1976 that he could not be permitted to continue taking courses as a provisional (non-degree student) after the spring, 1976 term since after a period of more than two years he had failed to meet the conditions for admission to the Ph.D. program. (Raymo Affidavit, January 6, 1977, R.I. #7)

In April, 1976, the plaintiff in this action instituted an action, also pro se, in the United States District Court for the Eastern District of New York against New York University. In his complaint in that action, the plaintiff sought a permanent injunction restraining New York University from interfering with his academic program and also claimed damages in excess of \$10,000.00. At the same time, the plaintiff moved for a preliminary injunction. The defendant New York University moved to dismiss the complaint pursuant to Rules 12 (b) and 56 (b) and opposed the plaintiff's motion for a preliminary injunction, submitting affidavits and exhibits in support of its motions. In opposition thereto, the plaintiff submitted an Affidavit and another document titled Additional Statements. After plaintiff and defendant appeared in court for a hearing,

the District Court for the Eastern District of New York issued a Memorandum and Order granting the defendant's motions to dismiss the complaint and for summary judgment. (Affidavit of Katharine B. Desai, January 6, 1977, R.I. #7; Affidavit of William C. Porth, January 19, 1977, P.I. #9)

Following the decision of the District Court for the Eastern District of New York, which was filed June 1, 1976, the plaintiff sent a letter dated August 1, 1976, to the Chairman of the Department of Politics. In this letter, the plaintiff identified himself as being currently enrolled in the Ph.D. program at New York University (completely ignoring the decision of the District Court that he was not a student at New York University) and requested that he be permitted to terminate the Ph.D. program with an M.A. degree, claiming that he had satisfactorily completed 32 credit points in the Department. Thereafter, plaintiff met with the Dean of the Graduate School of Arts and Science, Robert R. Raymo, who explained to the plaintiff that he had no current student status at New York University. Following that meeting, the Dean by letter of October 14, 1976, gave the plaintiff a written response to his request of August 1, 1976. The letter stated that the plaintiff had no current student status at New York University, and that his non-degree student status had terminated with the end of classes for the spring, 1976 term. The letter also indicated that, in accordance with University rules, the plaintiff would have to apply for and

be accepted into the M.A. program of the Department of Politics as a first step towards obtaining an M.A. degree from New York University. Further correspondence followed between the plaintiff and University officials until this lawsuit was initiated. (Raymo Affidavit, January 6, 1977 R.I. #7; Raymo Supplementary Affidavit, January 20, 1977 R.I. #9)

The only new matters alleged in the plaintiff's Southern District Complaint that were not before the Eastern District Court relate to the events occurring after the decision of that Court during the period from August through December, 1976, referred to in the preceding paragraph. These events are fully documented, and the documents are attached as exhibits to affidavits submitted by the defendant in opposition to the motion for preliminary injunction and in support of its motion to dismiss the complaint. Many of these documents can also be found as exhibits to the complaint. It is clear from the documentary evidence submitted by both plaintiff and defendant that these events of August through December, 1976 all relate to the same issue of the termination of the plaintiff's non-degree student status at New York University. The only other aspect of the Southern District Complaint that differs from the Eastern District Complaint is that the plaintiff has now added an allegation that the University has refused access to two documents in his file in violation of the Freedom of Information Act, 5 U.S.C. §552, and the Family Educational Rights and

Privacy Act of 1974, 20 U.S.C. §1232g ("The Buckley Amendment") and an allegation that the University has discriminated against him with respect to the interpretation and application of its regulations "through the motives of racism and callousness". These are completely unsubstantiated conclusory allegations.

The proper reading of the events occurring from August through November and December, 1976 is as follows. Having failed to receive his M.A. degree from Laval University and having been unsuccessful in his lawsuit against New York University in the District Court in the Eastern District of New York, the plaintiff in effect sought to have the University award him an M.A. degree on the basis of the courses he had been permitted to take as a non-degree student pending receipt of certification of an M.A. degree from Laval University. The University told the plaintiff that the only way that he could obtain an M.A. degree from New York University would be to apply for admission to the M.A. program, be accepted into that program and complete its requirements. The plaintiff has never applied for admission to the M.A. program. Instead, he filed this second lawsuit against the University.

ARGUMENT

POINT I

THE DISTRICT COURT JUDGE PROPERLY EXERCISED
HIS DISCRETIONARY POWER TO DISMISS THE
COMPLAINT SUA SPONTE AFTER DENYING THE MOTION
FOR A PRELIMINARY INJUNCTION.

The issues in this case turn on basic principles with respect to the scope of a district court's jurisdiction and powers. One issue is with respect to the power of a district judge to dismiss a complaint sua sponte at a pretrial stage after denying a motion for preliminary injunction. The other issue relates to the authority of a Judge of coordinate jurisdiction, sitting in the same court and case but hearing only a motion for preliminary injunction, to exercise that power and dismiss the underlying complaint. On a motion for preliminary relief, the moving party has the burden of showing a clear probability of success on the merits and the possibility of irreparable injury if the requested relief is not granted. In this circuit, the test in the first instance has been stated to be whether the plaintiff has shown "a strong likelihood of ultimate success on the merits plus irreparable damage if the relief sought is not granted". See e.g., Exxon Corp. v. City of New York, 480 F.2d 460 (2d Cir. 1973); Intercontinental Container Transp. Corp. v.

N. Y. Shipping Assoc., 426 F.2d 884 (2d Cir. 1970). Thus, in considering and dismissing the plaintiff's motion for a preliminary injunction, the district court necessarily considered what the plaintiff's likelihood of success on the merits would be. In doing so, the court concluded that the plaintiff had no right to complete his New York University program at the M.A. level since he was no longer a student at New York University, as judicially determined by the District Court of the Eastern District of New York, and thus no right which the District Court for Southern District could vindicate. The District Court then used its discretionary power to dismiss the underlying complaint. On appeal, the plaintiff, in effect, argues that the District Judge, hearing the motion for preliminary injunction, did not have the power to do this. It is defendant's view that the District Judge did have discretionary power to dismiss the complaint and, in the circumstances of this case, properly exercised that discretion.

The District Court Judge Had Discretionary Power To Dismiss The Complaint Sua Sponte After Denying The Motion For A Preliminary Injunction.

Generally, the authority for a court to dismiss a complaint is statutory. Rule 41 of the Federal Rules of Civil

Procedure governs dismissals of complaint. Rule 41 (b)* spells out specific reasons for which a defendant may move to dismiss a case. It is clear, however, from the text of the rule referring to "any dismissal not provided for in this rule" that an action may be dismissed for reasons other than those stated in the first sentence and that the dismissal may be on the court's own motion. 5 Moore's Federal Practice ¶14.14 [1] at 1173 (2d ed. 1976). While Rule 41 refers only to orders of dismissal on defendant's motion, it does not in any way limit the court in ordering a dismissal sua sponte. At the same time, the principle expressed in Rule 41(b) as to when an order for dismissal is an adjudication upon the merits applies to a sua sponte order of dismissal by a court. Thus, in Costello v. United States, 365 U.S. 265 (1961),

*Rule 41 (b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

the Supreme Court concluded that a prior decision of a district court dismissing a complaint sua sponte for failure of the plaintiff to comply with its order was an adjudication upon the merits to be governed by the same policy expressed in Rule 41(b), even though a dismissal sua sponte is not an enumerated ground in Rule 41(b). 365 U.S. at 286, 287. In reaching that conclusion, the Supreme Court implicitly recognized the common law power of the court to dismiss a complaint on its own motion.

As in the Costello case, most cases dealing with the power of a court to dismiss a complaint sua sponte discuss the question in the context of the issue of res judicata, i.e., whether the action of the first court in dismissing a complaint sua sponte was on the merits and with prejudice, thus barring further litigation. See e.g., Safeway Stores v. Fanman, 308 F.2d 94 (9th Cir. 1962) (prior dismissal without prejudice was error; dismissal should have been on the merits); American National Bank & Trust Co. of Chicago v. United States, 142 F.2d 571 (D.C. Cir. 1944) (dismissal in first action on the merits). In this particular case, the decision by the District Court for the Eastern District of New York was clearly on the merits on the defendant's motion to dismiss the complaint and for summary judgment, after appearance before the court. (See Point II, infra) If the plaintiff had any dissatisfaction with that decision, his remedy was by way of appeal, which was dismissed for his failure to prosecute.

Although the issue has not arisen frequently, as far as reported opinions indicate, there are several Courts of Appeal's

decisions which affirm the right of a district court to dismiss a complaint sua sponte for reasons of res judicata. In Hicks v. Holland, 235 F.2d 183 (6th Cir.) cert. denied 352 U.S. 855 (1956), the Court of Appeals held that the district judge sua sponte properly dismissed the complaint in the action before him for the reasons he stated: that the records of the district court showed that a complaint covering the same subject matter and the same parties had been dismissed by one of the judges of that court for lack of jurisdiction under Rule 12(h)(2) of the Federal Rules of Civil Procedure; and that that dismissal, on jurisdictional grounds, brought the action with the principle of res judicata.

The Sixth Circuit in Hicks relied on an earlier decision of the Second Circuit Court of Appeals, W. E. Hedger Transp. Corp. v. Ira S. Bushey & Sons, Inc., 186 F.2d 236 (1951) in which the plaintiff appealed from an order dismissing his complaint before answer in a suit in equity to set aside a decree for closing a preferred ship mortgage. In Hedger, this Court noted that the district judge had recognized the identity of issues and parties with previous litigation in the district court and had dismissed the complaint on the ground that the previous judgment of dismissal was res judicata. Affirming the dismissal, this Court observed that the defense of res judicata should usually be pleaded: "But where all the relevant facts are, as here, shown by the Court's own records, of which it takes

notice, there appears no good reason why an answer should be first required." 186 F.2d at 236. In a footnote unrelated to the holding of the case, the Ninth Circuit Court of Appeals, citing Hicks v. Holland, supra, noted that a district court acting sua sponte, may dismiss an action where the records of that court show that a previous action covering the same subject matter and parties had been dismissed. Evarts v. Western Metal Finishing Co., 253 F.2d 637, 639 N.1 (1958). In Gullo v. Veterans Cooperative Housing Assoc., 269 F.2d 517 (D.C. Cir. 1959), the Court of Appeals affirmed the dismissal of a complaint by the district court after taking judicial notice of a previous case between the parties.

While in each of these cases, the prior action was instituted in the same district court so that the Court was able to take "judicial notice" of its own records with respect to the first action, no reason appears why a prior action must be in the same court to justify a sua sponte dismissal of a complaint on the grounds of res judicata. Since a complaint may be dismissed upon defendant's motion prior to an answer or a hearing on the grounds of res judicata even though the prior litigation was in another court, a district court should not be precluded from dismissing a complaint sua sponte when it has before it evidence in the form of a copy of an Order of another federal district court in prior litigation involving the same parties and a Memorandum explaining the basis for the court's order. The

plaintiff has never denied that the first litigation took place. Indeed, his complaint refers indirectly to it and Exhibits 31 and 34 to the complaint are letters of the plaintiff and defendant's counsel, respectively, to this Court concerning plaintiff's appeal of the Eastern District litigation. Moreover, in opposing the motion for preliminary injunction, defendant advised the District Judge of its intention to move for summary judgment on the basis of res judicata. The District Judge had adequate evidence with respect to the prior decision and its basis.

Plaintiff in his brief devotes considerable attention to the distinction between law and equity, arguing that since Judge Carter was hearing a motion for a preliminary injunction (an equity proceeding), that he had no jurisdiction to render a decision on the underlying complaint (presumably one that plaintiff characterizes as being at law). There is no distinction to be made between a district court sitting in equity or at law with respect to this case since the statutory grant of jurisdiction in 28 U.S.C. §1331 gives the district courts original jurisdiction of "all civil actions" (which was substituted for the phrase "all suits of a civil nature, at common law or in equity"). Plaintiff also argues that the district court judge who heard his motion for a preliminary injunction could not rule on the merits of the underlying complaint because the judge to whom the case was originally assigned retained jurisdiction with respect to the case. Within the Southern District Court, the district judge who heard the motion for preliminary injunction has coordinate jurisdiction

with the judge to whom the case was assigned. Defendant believes that the authority of the former judge to dismiss the underlying complaint was in no way diminished by the fact that the case had been assigned to another judge.

The district judge who heard the motion for a preliminary injunction necessarily had to review the merits of the complaint. Having done so and having concluded that the motion for preliminary injunction must be denied, and having become aware of the prior litigation and the decision of the District Court for the Eastern District of New York, the judge exercised the inherent powers of the district court, in the interests of expeditious resolution of litigation, to dismiss the complaint sua sponte .

The Dismissal was a Proper Exercise of the Court's Discretion.

Although earlier decisions were in conflict on this point, it is now clear, at least in this circuit, that the affirmative defense of res judicata can be raised by motion prior to an answer. Thistlewaite v. City of New York, 362 F.Supp. 88 (S.D.N.Y. 1973), aff'd 497 F.2d 339 (2d Cir. 1974) cert. denied 95 S.Ct. 686 (1975); Connelly Foundation v. School District of Haverford Township, 461 F.2d 495 (3d Cir. 1972). In dismissing the present action, the district judge relied on his own previous decision in the case of Weston Funding Corp. v. Lafayette Towers Inc., 410 F. Supp. 980 (S.D.N.Y. 1976), aff'd F.2d (2d Cir.

Slip Opinion No. 76-7190, January 4, 1977). In that case he considered the question of when the defense of res judicata can be raised.

The defense of res judicata, while contained in the list of affirmative defenses in F.R.Civ.P. 8(c), is not specified as a ground for a pretrial motion to dismiss pursuant to Rule 12(b), F.R.Civ.P. or for summary judgment pursuant to Rule 56, F.R.Civ.P. Nevertheless, it has generally been held in this circuit that in the interest of efficient and expeditious judicial administration, the defense of res judicata can be raised and considered at the pretrial stage. * * * This is particularly true where, as here, the issue is raised by way of motion for summary judgment so that the plaintiff is provided with an adequate opportunity to present arguments rebutting the defense. 410 F.Supp. at 982. (citations omitted).

Plaintiff argues that he is entitled to a trial, but this is not a case in which the plaintiff is in any way prejudiced by the dismissal of the complaint, since he has already had an adequate opportunity to present his arguments in the earlier case. In Link v. Wabash R.R. Co., 370 U.S. 626 (1961), in discussing the propriety of a district court's dismissal sua sponte of a complaint for lack of prosecution, the Supreme Court said the following:

Nor does the absence of notice as to the possibility of dismissal or the failure to hold an adversary hearing necessarily render such a dismissal [on the Court's own motion for failure to prosecute] void. It is true, of course, that "the fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked" * *

* * but this does not mean that every order entered without notice and a preliminary adversary hearing offends due process. The adequacy of notice and hearing respecting proceedings that may affect a party's rights turns, to a considerable extent, on the knowledge which the circumstances show such party may be taken to have of the consequences of his own conduct. The circumstances here were such as to dispense with the necessity for advance notice and hearing. 370 U.S. at 632. (citation omitted)

The circumstances of this case, although different from those in a failure to prosecute dismissal, equally warrant the action taken.

Plaintiff raises as issues whether Rule 65 grants jurisdiction over the subject matter and whether a trial pursuant to Rule 65 is a trial on the merits. Rule 65 has no application here. This is not a case in which the court ordered the trial of the action on the merits to be advanced and consolidated with the hearing of the application under Rule 65(a)(2) of the Federal Rules of Civil Procedure. In such a case, the consolidation must be on notice to both parties so that each has a full opportunity to present evidence in the case; and it is error to treat the hearing on the preliminary injunction as the trial on the merits where there was no notice of the consolidation pursuant to Rule 65(a)(2). 7 Moore's Federal Practice ¶65.04[4] (2d ed. 1975). In the present case, the district court, following the practice in the Second Circuit, considered the defense of res judicata at the pretrial stage and concluded that that doctrine applied. Thus the question of consolidating the trial with the hearing

on the merits does not arise. Although in Nationwide Amusements Inc. v. Nattin, 452 F.2d 651 (4th Cir. 1971) the Court of Appeals concluded that "under the circumstances of this case the District Court erred in dismissing the suit on the merits when it was before the court only on the motion for preliminary injunction" (452 F.2d at 652), that case did not involve the issue of res judicata and the Court left open the possibility that such a dismissal might not be improper. The Court of Appeals concluded that it would be necessary for the district court to determine whether, as well as having been surprised, the appellant had also been prejudiced by the dismissal and remanded for "the narrow purpose of determining if appellant had the opportunity to fully develop its case on the constitutional issues". Id. Thus, the Fourth Circuit Court of Appeals implicitly recognized that there might be some circumstances in which a district court in its discretion might conclude that dismissal of a complaint was warranted at a hearing on a motion for preliminary injunction. In the present case, the district court judge was clearly correct in his determination that the doctrine of res judicata applied, and thus did not, in any way, abuse his discretionary power in dismissing the complaint.

POINT II

THE DISTRICT COURT CORRECTLY DETERMINED
THAT THE PRESENT ACTION WAS BARRED BY
RES JUDICATA.

In concluding that the present action was barred by the doctrine of res judicata, the district judge relied on his earlier decision in the case of Weston Funding v. Lafayette Towers Inc., 410 F.Supp. 980 (S.D.N.Y. 1976) aff'd F.2d (2d Cir. Slip Opinion No. 76-7190, Jan. 4, 1977). In that case, he restated what a court must determine in order to apply the doctrine of res judicata:

It is well settled that for a judgment in a prior action to be a bar to reaching the merits in a subsequent action the following elements must be established. First, the prior judgment must have been rendered by a court of competent jurisdiction; second, the prior judgment must have been a final judgment on the merits; and third, the same cause of action and the same parties or their privies must have been involved in both suits. 410 Supp. at 983 (footnote omitted).

Considering each of these elements, it is clear that the district court correctly determined that the present action was barred by res judicata.

The Prior Decision Was Rendered By A Court Of Competent Jurisdiction.

As in the Weston Funding case, supra, there can be no

dispute that the District Court for the Eastern District of New York was fully competent to decide the controversy before it. While the plaintiff raises as issues before this Court whether the "trial" in the Eastern District Court conformed to procedural requirements of due process and whether the decision of the Eastern District Court was "judicial", he does not dispute the competency of that Court to hear the case in the first instance. Since he chose the forum, he could hardly question it now.

The Prior Judgment Was On The Merits.

The second element, whether the prior judgment was a final decision on the merits, is one that in some cases has caused difficulty. In the present action, there is no doubt that the decision of the Eastern District Court was on the merits. In the Eastern District action ("Ayah I"), the defendant moved pursuant to both Rules 12(b) and 56(b). In his Memorandum and Order, the District Judge said: "There is no indication in the papers filed with the Court that defendant has violated any rights of the plaintiff which could form a legal basis for a cause of action." (R.I. #7) The Eastern District Court then granted the defendant's motion for summary judgment. The Southern District Court recognized that that determination was the same as that of the New Jersey District Court in Weston Funding, supra. In Weston Funding, the federal

district court for the District of New Jersey did not dismiss the first action because of lack of jurisdiction; rather, it granted summary judgment against the plaintiff for failure to state a claim upon which relief could be granted. That is precisely what the Eastern District Court did in Ayah I. In its opinion affirming the Southern District Court application of res judicata in Weston Funding, supra, this Court pointed out that in Angel v. Bullington, 330 U.S. 183 (1947), the Supreme Court had long ago made clear that a decision dismissing a complaint for failure to state a claim upon which relief could be granted is a decision on the merits for purposes of res judicata even if a court does not pass on the underlying substantive issues in the litigation. __F.2d at 1251 (Slip Opinion No. 7190). Thus, there is no basis for regarding the decision of the Eastern District Court in Ayah I as coming within one of the exceptions to Rule 41 that would preclude the decision from operating as an adjudication on the merits.

Judge Carter in his opinion in Weston Funding Corp., points out that the reason for the requirement that a judgment be rendered "on the merits" for res judicata purposes is to guarantee every plaintiff the right to be heard once on the substance of his claim. 410 F.Supp. at 983. This guarantee of a right to be heard does not mean that there necessarily has to be an evidentiary hearing. In a recently reported case, Mitchell v. National Broadcasting Co., 45 U.S.L.W. 2485 (April 19, 1977), this Court observed that the fact that a determination is made on

the legal merits without a formal evidentiary hearing is not a bar to the application of res judicata principles when the same claim is raised in another form. 45 U.S.L.W. at 2485. In a case also involving admission to an educational institution, Stuhl v. Tauro, 476 F.2d 233 (1973), the First Circuit Court of Appeals affirmed a district court's dismissal on the basis of res judicata and direct estoppel. The plaintiff's first action against the defendant had been dismissed by another judge in the district court for lack of a substantial federal question. After that dismissal had been affirmed and after the plaintiff's motion for leave to file a petition for rehearing was denied, the plaintiff, who was seeking admission to Law School, filed a second action which the Court of Appeals identified as "practically identical" to the earlier action. The Court of Appeals declined to consider a second time the issue of whether a substantial federal question was presented, and affirmed the second dismissal, commenting that the plaintiff could not now relitigate the issue, regardless of whether the prior decision was deemed to be on the merits or merely jurisdictional. The Court of Appeals saw no need for an evidentiary hearing, and there was none. The same is true in this case.

In Both Suits, The Causes Of Action And The Parties Are The Same.

The third element to establish is whether the same cause of action and the same parties are involved in both suits.

This Court in Herendeen v. Champion International Corp., 525 F.2d 130 (1975), has set forth the various tests to make this determination.

The test for determining whether causes of action are the same for purposes of res judicata has been variously expressed. Most frequently cited as the relevant criteria by both this court and the New York courts are whether a different judgment in the second action would impair or destroy rights or interests established by the judgment entered in the first action, whether the same evidence is necessary to maintain the second cause of action as was required in the first, and whether the essential facts and issues in the second were present in the first. 525 F.2d at 133-134. (footnotes omitted)

Applying these various criteria in the present case, the answer to all three is in the affirmative.

Considering the third point - whether the issues in the second action were present in the first, both in the Eastern District action and the present action the plaintiff complains of violations of right of due process and equal protection. In the present action, he has added allegations of a violation of his rights under the Freedom of Information Act, 5 U.S.C. §552 et seq., and under the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. §1232g ("the Buckley Amendment"). But the mere allegation of different jurisdictional grounds is not sufficient to constitute a different cause of action. See Comment(a), Section 63, Restatement of Judgments. Aside from the

fact that neither of these statutes give the plaintiff a cause of action, he could have made this allegation in the Eastern District case but failed to do so. Nor can the plaintiff find a new cause of action by changing the characterization of the same facts that formed the basis for his earlier action by alleging that the University has discriminated against him. This is a situation not unlike that in Stuhl, supra, where the Court of Appeals noted that the only difference between the complaint before it and the prior complaint was the addition of a sentence to the effect that the plaintiff "is arbitrarily being denied admission to law school". 476 F.2d at 234.

With respect to whether the facts were the same, the only facts not before the Eastern District Court relate to the events following the decision of that court. Any allegations of discrimination by the plaintiff that relate to those later events are merely conclusory, and without any factual allegations in support. The observation of this Court in the case of Birnbaum v. Trussel, 347 F.2d 86 (1965), finding that the complaint in that case was inadequate, is equally appropriate here:

Plaintiff has made "vague and conclusionary allegations" of discrimination based only on the difference in race between himself and some of the defendants without showing otherwise of an "intentional and purposeful deprivation of constitutional rights".
347 F.2d at 90.

Moreover, these later events cannot give rise to a new cause of action. In denying the plaintiff's motion for a preliminary injunction, Judge Carter observed: "As to the claim with respect to the right to complete his N.Y.U. program at the M.A. level, since the plaintiff is not now a student at N.Y.U. he has no right in that regard which this court could vindicate." (Endorsement, Jan. 25, 1977 R.I.11) With respect to his student status as determined by the Eastern District Court, the plaintiff is directly estopped and cannot assert any new cause of action with respect to the University's refusal to award him an M.A. degree. Restatement of Judgments §61 (1942).

Finally, plaintiff cannot establish a new cause of action by choosing a different form for seeking relief. Restatement of Judgments §63 (1942). In the Eastern District action, plaintiff sought a permanent injunction enjoining the defendant from interfering with his academic program. In the present action, he seeks a declaratory judgment against New York University, as the District Judge put it: "on various issues relative to his dispute with the institution in regard to his student status". (Endorsement, R.I. 11) The underlying action here for a declaratory judgment is one which is addressed to the court's judicial discretion. A declaratory judgment should not be used to reexamine what has been determined in another court. H. J. Heinz Co. v. Owens, 189 F.2d 505, 508 (9th Cir. 1951) cert. denied 342 U.S. 905 (1952). As Justice Frankfurter stated

in Angel v. Bullington, 330 U.S. 183, 192-193 (1947):

The doctrine of res judicata reflects the refusal of law to tolerate needless litigation. Litigation is needless, if, by fair process, a controversy has once gone through the courts to conclusion And it has gone through, if issues that were or could have been dealt with in an earlier litigation are raised anew between the same parties.

The present case is an obvious example of needless litigation.

CONCLUSION

The District Court's denial of the preliminary injunction and dismissal of the underlying complaint was within the Court's discretion and was fully supported by the record. There is no basis for a finding that the lower court's determination constituted an abuse of discretion and it should accordingly be affirmed.

Dated: New York, New York
May 9, 1977

Respectfully submitted

WILLIAM C. PORTH
Attorney for Defendant-Appellee
70 Washington Square South
New York, New York 10012

Tel: (212) 598-2691

Of Counsel:
Katharine B. Desai

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

376-Affidavit of Service by Mail

The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

Simon O. Ayah,
Plaintiff-Appellant,
Pro Se

against

New York University,
Defendant-Appellee.

State of New York, County of New York, ss.:

Kenneth P. Riccardi
for William C. Porth

, being duly sworn deposes and says that he is agent
the attorney

for the above named Brief for Defendant-Appellee herein. That he is over
21 years of age, is not a party to the action and resides at 2821 W. 12th St. Bklyn, N.Y. 11224

That on the 9th day of May, 1977 he served the within

BRIEF FOR DEFENDANT-APPELLEE

upon the attorneys for the parties and at the addresses as specified below

Simon O. Ayah

Plaintiff-Appellant

P.O. Box 1638

Brooklyn, N.Y. 11202

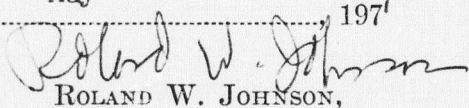
by depositing Three (3) true briefs

to each of the same securely enclosed in a post-paid wrapper in the Post Office regularly main-
tained by the United States Government at

90 Church Street, New York, New York

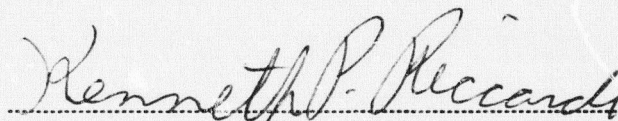
directed to the said attorneys for the parties as listed above at the addresses aforementioned,
that being the addresses within the state designated by them for that purpose, or the places
where they then kept offices between which places there then was and now is a regular com-
munication by mail.

Sworn to before me, this 9th
day of May, 1977


ROLAND W. JOHNSON,

Notary Public, State of New York
No. 4509705

Qualified in Delaware County
Commission Expires March 30, 1979


Kenneth P. Riccardi